Supreme Court of the United States

OCTOBER TERM, 1950

No. 524

JOHN E. LYDON and MARTHA LYDON, his wife,
Petitioners,

vs.

R. W. CARNEY and DOROTHY CARNEY, his wife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF

JOHN E. LYDON, *Petitioner*
In propria persona.

1520 Smith Tower,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

TABLE OF CASES

	Page
Bowe v. Scott, 233 U.S. 658	8
Capital City Dairy Co. v. Ohio, 183 U.S. 238	7
Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U.S. 326	13
Cumberland Coal Co. v. Board of Revision, 284 U.S. 23	6
Fleming v. Fleming, 264 U.S. 29	6
Forbes v. State Council, 216 U.S. 396	13
Great Northern R. Co. v. Sunburst Co., 287 U.S. 358	6
Harding v. Illinois, 196 U.S. 78	6
Herndon v. State of Georgia, 295 U.S. 441	5
Kosten v. Fleming, 17 Wn.(2d) 500, 136 P.(2d) 449; 21 Wn.(2d) 825, 153 P.(2d) 309	12
McCorquodale v. State of Texas, 211 U.S. 432	14
Oxley Stove Co. v. Butler County, 166 U.S. 648	3
State v. Hazzard, 76 Wash. 586, 137 Pac. 143	10, 14
State ex rel. Milwaukee Term. R. Co. v. Superior Court for King County, 54 Wash. 365, 103 Pac. 469; 104 Pac. 175	9
Waters Pierce Oil Co. v. State, 106 S.W. 326	13

TEXTBOOKS

5 C.J.S. 1560, § 1906	12
79 L. ed. 1540, Ann.	6

CONSTITUTION

United States Constitution, Fifth and Fourteenth Amendments	10

COURT RULES

Revised Rules of the Supreme Court of the United States, Rule 38	2
Rules of Washington State Supreme Court, Rules of Practice, Rule 14	2
Rule 15	9

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN E. LYDON and MARTHA LYDON, his wife, *Petitioners,*

vs.

R. W. CARNEY and DOROTHY CARNEY, his wife, *Respondents.*

No. 524

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF

Respondents' argument for a denial of the Petition is predicated upon three numerically arranged grounds, as follows:

I. The Petition is not in conformity with the rules of the court.

II. The Federal claim was raised too late in the highest state court, which had lost jurisdiction of the cause.

III. No Federal question was passed upon by the state court.

Ground I.

Under this heading respondents refer to petitioners' statement on page 15 of the Petition to the effect that the questions involved would be treated further in a supporting brief, and with manifest sarcasm ask:

> "When are we to get the 'special treatment'? When will petitioners decide to raise their Federal question in *this* court?"

In faithful consistence with such attitude, respondents then apply their own personal interpretation of rule 38, Revised Rules of the Supreme Court of the United States, concerning "opposing briefs" and practically "sit tight" as to all grounds and contentions set forth in the Petition except the "lone" one whether or not the Federal question was raised in the court below.

We submit that respondents' "opposing brief" must cover the entire case as set forth in the Petition for a Writ of Certiorari, and not just the authority-backed questions and phases of the case. Respondents, therefore, having deliberately failed to do so, must be deemed to admit all other unopposed grounds and contentions set forth in the Petition for a Writ of Certiorari.

Respondents' Ground II-A

In our Petition we argue and submit to Your Honors that the State Supreme Court did not render a final decision until its complementary *per curiam* opinion was filed on November 30, 1950, following which the Remittitur of the State Supreme Court was issued and transmitted to the Clerk of the Superior Court. The rule which caused the State Supreme Court to recall its first opinion and complete its decision on November 30, 1950, provides, *inter alia,* as follows:

> "and the Supreme Court *shall,* if it reverses the judgment entered, notwithstanding the verdict, review and determine the validity of the ruling on the motion for a new trial." (Tr. 37)

That the Supreme Court intended thereby to place upon itself a mandatory requirement for finality of its decision in such cases may be seen from the following definition given in the recently published revision of Rules on Appeal of the Supreme Court of the State of Washington:

> "(d) The word 'shall' and 'must' are mandatory, and the word 'may' is permissive." (Suppl. Tr. 2)

In *Oxley Stove Co. v. Butler County,* 166 U.S. 648, cited by respondents, the court had for review a final judgment of the Supreme Court of Missouri, *affirming* a trial court's judgment. After going exhaustively into the facts of the case, the court rules as follows:

> "Looking into the record, we do not find that *any reference* was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that the court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause *without any thought* that it was expected to decide a Federal question." (page 655).

Before distinguishing the rest of respondents' cases, we may be allowed to repeat here *a propos* of the judgment sought to be reviewed in the instant case, that petitioners had *prevailed* in the trial court and from a judgment in their favor respondents herein appealed to the State Supreme Court. Up to this point, therefore, there could be no occasion for petitioners to raise any question against the judgment, whether Federal or any

other. Thereafter, the State Supreme Court reversed the said judgment and entered judgment for respondents herein on November 30, 1950. Any Federal question, therefore, as far as petitioners are concerned, commenced to appear since the State Supreme Court entered judgment for respondents herein in reversal of the trial court's judgment. Until that time the state court's opinion could be rewritten as many times as the five Judges of the deciding Department of the Supreme Court, or all nine members thereof, might choose. Hence, it is our contention that the Federal question under the 14th Amendment did not exist until it was created by the State Supreme Court's final decision on November 30, 1950, and the filing of its Remittitur. To anticipate it in that state of the record would have meant to anticipate a defeat in the state Supreme Court by a reversal of petitioners' judgment upon the appeal by Respondents herein.

The court says further in the Oxley case:

> "Nor *can it be inferred* from the opinion of the Supreme Court of Missouri that the court was *informed* by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted."

In the instant case, the Supreme Court of the State of Washington was not only "informed" that its decision violated rights of petitioners guaranteed by the 14th Amendment, but, what is more important, it specifically states so in its order, dated December 22, 1950, namely, that it has considered the Federal question, as a ground and reason for a recall of the Remittitur and re-argu-

ment of the case, and with that in mind it denied the Petition. The State Supreme Court takes particular pains, by its order of December 22, 1950, to enumerate, with apt punctuation and specific reference to title, all three proceedings pending before it, namely, "Respondents' Petition for the Recall of the Remittitur herein; the appellants' Memorandum in answer thereto; and the respondents' *Reply* to the appellants' Memorandum" (Tr. 35).

Herndon v. State of Georgia, 295 U.S. 441, was an appeal from a judgment of conviction, which the State Supreme Court merely affirmed. In the trial court the indictment was attacked as being in violation of the U. S. Constitution, but the court's ruling "was not preserved by exceptions *pendate lite* or assigned as error in due time in the Bill of Exceptions, as the settled rules of the state practice require"; hence the State Supreme Court declined to review any of the rulings of the trial court in respect of that and other preliminary issues.

> "The Federal question was never presented to the state court unless upon motion for rehearing; and that court then *refused to consider* it. The long-established general rule is that the attempt to raise a Federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually *entertains the question* and *decides* it. (Italics petitioner's.)

It was claimed further in that case that petitioner came within the rule of "unanticipated' decision of the State Supreme Court, in which case the U. S.

Supreme Court concedes that the question was properly presented by a petition for rehearing:

"The whole point, therefore, is whether the ruling here assailed should have been anticipated." The court ruled in the negative on this point, with Justices Cardozo, Stone and Brandeis dissenting.

In the Annotation to that case, 79 L. ed. 1540, the following is stated on this question:

"However, where the Federal question, although first presented in a petition for rehearing to the highest state court *after a final* judgment therein, is *considered* or decided by that court in *passing on the petition,* the question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court"; giving as authorities for the rule: *Great Northern R. Co. v. Sunburst Co.* 287 U.S. 358; *Fleming v. Fleming,* 264 U.S. 29; and *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23.

In the *Fleming* case, *supra,* the Federal question was first raised in an application for a *second* rehearing in the State Supreme Court; and in the Cumberland case the question of constitutionality was first presented in a petition for reargument to the highest state court.

Harding v. Illinois, 196 U.S. 78. cited by respondents, was an action to recover delinquent taxes on real estate. It was claimed at the trial that the property in question had been conveyed by defendant Harding to a loan company for a consideration of $5.00, but both trial court and the State Supreme Court, later, held that the property was defendant's own notwithstanding the

pretended conveyance. The Illinois statute, under which the action was filed, provided in effect that in any such suit for forfeited taxes the fact that the real estate is assessed to a person shall be *prima facie* evidence of ownership by that person. In the assignment of errors before the Supreme Court of Illinois, the closest that appellant came to raising the Federal question was as follows:

> "The findings and judgment of the court were erroneous for the several reasons stated in the points filed in support of the motion to set aside the findings and grant a new trial." (196 U.S. 85).

It is obvious from the foregoing that respondents herein overlook the fact that until the decision of the State Supreme Court was handed down in the instant case, petitioners, as the prevailing party, had no grievance whatever against the judgment appealed from by respondents. Petitioners actually became the aggrieved party in the case only upon the entry of the State Supreme Court's judgment on November 30, 1950, and not until then. When this is taken into consideration, respondents' authorities are not only inapplicable to the situation on hand, but it would seem that they were grasped at by respondents at random without a critical study and analysis of the principle involved.

We quote the following syllabus from *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, also cited by respondents, as typical of the above mentioned distinction:

> "A general statement in the answer to *quo warranto* proceedings in a state court to forfeit the franchise of a corporation for its violation of a state statute, that the proper remedy is by a crim-

inal prosecution, and that "this proceeding" is in violation of the Constitution of the United States," is not sufficient to raise a Federal question, where no specification is made as to the particular clause of the Constitution relied upon, and there is nothing in the record *to show that the attention* of the state court was directed to that question." (Italics petitioners'.)

In *Bowe v. Scott,* 233 U.S. 658, it was also sought to review a decree of the state of Virginia *affirming* the decree of the Chancery Court of the city of Richmond. The court concludes that "no intimation *whatever* was contained in the opinion of the court of appeals that it deemed that a question under the contract clause of the constitution arose for decision" (pp. 664-665).

In concluding our reply to Respondents' Ground II-A, may we submit to Your Honors that even if respondents are right in the position which they take, namely, that the Federal question was for the first time raised in the Supreme Court by the second Petition for Rehearing or Reargument, petitioners will still have met the jurisdictional requirement, in view of the particular circumstances of this case.

The court will notice by reference to the record that the state court's first opinion was recalled on November 10, 1950 (Tr. 28) as incomplete under Rule 14 thereof (Tr. 36), and a *per curiam* opinion incorporating its previous opinion was later filed (Tr. 29), as the result of which a judgment for respondents was entered in reversal of the one in favor of petitioners.

Under the rules of the State Supreme Court, par-

ticularly Rule 15 (Supplemental Tr. 1) the State Supreme Court's decision did not become final until the lapse of 30 days thereafter. Respondents then having filed their Petition to Recall the Remittitur and set the case for Reargument, upon the specific claim that the decision of the court violated petitioners' right to equal protection of the laws guaranteed by the 14th Amendment, was timely, hence the court's order denying said Petition must be deemed to be a denial by the State Supreme Court that a Federal right of petitioners was violated by the court's unanticipated decision and judgment against petitioners.

Respondents' Ground II-B

What we have said before in discussing respondents' Ground II-A practically answers every contention of respondents made under this heading in their opposing brief.

We will however comment specially on the two Washington cases cited therein.

In *State ex rel. Milwaukee Term. R. Co. v. Superior Court for King County,* 54 Wash. 365, 377, 103 Pac. 469 and 104 Pac. 175, the trial court entered a judgment dismissing condemnation proceedings, which judgment was thereafter reversed by the State Supreme Court. The case was in effect a contest between relator Milwaukee R. Co. and the Great Northern Ry. Co. referred to in the opinion as the respondent. Subsequent to the reversal respondent Ry. Co. urged as additional grounds for affirmance of the lower court: (1) that the relator is not a railroad corporation within the meaning of

the eminent domain statute; (2) that the property sought to be condemned was already devoted to a public use, and (3) that there was not a sufficient showing of necessity of appropriation. All these contentions could of course have been made in the main hearing of the case before the State Supreme Court under separate assignments of error. The State Supreme Court ruled in line with other jurisdictions, that it could not "sanction the practice of permitting new questions to be raised in a petition for rehearing."

In *State v. Hazzard,* 76 Wash. 586, 137 Pac. 143, a judgment of conviction was affirmed by the Supreme Court. In a petition for rehearing the appellant defendant in the case sought to have the Supreme Court reconsider its decision of affirmance upon the further ground, advanced for the first time in such petition, that "the method of prosecution adopted by the state and permitted by the trial court and the charge to the jury given by the trial court constituted an infringement of the rights and privileges guaranteed to the defendant by the 5th and 14th Amendments of the Constitution of the United States, etc."

The State Supreme Court held that all these *extra* objections existed and could be raised at the trial of the case and upon appeal to the State Supreme Court, but were not so raised, hence it declined to entertain them for the first time.

We have argued extensively, before, that we did not become an aggrieved party until after the State Supreme Court reversed the judgment entered by the trial court in favor of petitioners.

To raise a constitutional question prior to the Supreme Court's final decision and judgment would have meant that we were offering issues hypothetically by assuming that the state court would reverse the judgment which we were naturally bound to sustain in the appeal by respondents.

Ground II-C

In further replying to respondents' various and somewhat inconsistent contentions we submit again here as in our petition (p. 14) that we lay no claim to distinction in method of presentation of the Federal question to the State Supreme Court. Nor do we believe the law to be that, in such an important matter as the infringement of a right guaranteed by the United States constitution, extreme and exacting technique is a *sine qua non* before entry through the portals of the Tribunal which has the final say in such matters. This nation of ours was above all founded and grew into leadership by and through common people, using common sense and plain ways, and if there is any branch of the state where this should be best exemplified, it is in the Temple of even scales of the balance, held by hands spelling innocence with bandaged eyes to emphasize precisely that whether dressed in ragged clothes or silk hat and spats, the seeker will therein find justice. It is enough, we believe, as far as this question is concerned, that it was presented fairly promptly after the Federal right appeared and this the state court acknowledged and "considered" in unmistakable terms by its order of Dec. 22, 1950 (Tr. 35).

Respondents' Ground II-D

Kosten v. Fleming, 17 Wn.(2d) 500, 136 P.(2d) 449, would of course have no application, if our contention, that the State Supreme Court did not actually render its final decision in this case until November 30, 1950, is right; and the State Supreme Court quite obviously agreed that we are right in this contention at least by wording its order of December 22, 1950, with scrupulous care. (Tr. 35)

In any event, however, that case is no authority that the state court lost jurisdiction to recall its Remittitur by virtue of its inherent right, which it emphasizes throughout, whenever it appears that its decision is erroneous on its face. Indeed in that case the State Supreme Court *did recall* the Remittitur, later, and rendered an amended decision, reported in 21 Wn.(2d) 825, 153 P.(2d) 309.

A study of that case and the authorities cited therein shows that the court reaffirms its inherent jurisdiction to recall the Remittitur for the purpose of correcting errors appearing on the decision, but not in order to reconsider issues submitted or which could have been submitted on appeal. With this we naturally agree. That there is a denial of a constitutional guarantee in this case is either apparent upon the face of the decision, born that is for the first time by the final rendering thereof on November 30, 1950, or else we have no case before the U. S. Supreme Court.

In the *Kosten* case, *supra,* the court refers to 5 C.J.S. 1560, Section 1906, where, among other instances listed

for the exercise of an appellate court's inherent right to recall its remittitur, are the following:

> "Or where the mandate was prematurely and erroneously issued before the expiration of the time allowed by statute for a rehearing, or for the taking of appeal or error proceedings to a still higher court."

The case of *Waters Pierce Oil Co. v. State,* 106 S.W. 326, given in the footnotes of the text, presents an analogous situation, as the following excerpt shows:

> "The affirmance of that order being a final judgment of the Court of Civil Appeals, this court has jurisdiction by Writ of Error to review the proceedings of the courts in that matter, and, the appellant in the Court of Civil Appeals having a right to present to this an application for Writ of Error, the clerk of that court had no authority to issue the mandate on the judgment of the Court of Civil Appeals until the expiration of the time allowed by law for the filing of an application for Writ of Error in that court." (page 329)

Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co. 228 U.S. 326, is not in point since the claimed Federal questions could and should have been a part of the issues tried in that case, whereas in the instant case it is the Supreme Court's decision which created the same, hence it would have been impossible to anticipate it.

The case of *Forbes v. State Council,* 216 U.S. 396, is distinguishable on the same principle, namely that the Federal question could and should have been raised as a part of the issues in the case.

Lastly, the case of *McCorquodale v. State of Texas,* 211 U.S. 432, was an appeal from a judgment of conviction and upon affirmance thereof by the State Court of Criminal Appeals an effort was made to have a Writ of Certiorari issued, claiming, for the first time, a denial of a Federal right.

This case is very similar in principle to the Washington case of *State v. Hazzard,* 76 Wash. 586, 137 Pac. 143, cited by respondents under group II-B.

We submit that Petitioners have presented a proper case for the Supreme Court's review upon a Writ of Certiorari.

Respectfully submitted,

JOHN E. LYDON
In propria persona